

February 12, 2003

**Via Electronic Submission**

The Hon. Michael K. Powell  
Chairman  
Federal Communications Commission  
455 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 & 98-147 – Triennial Review Proceeding.

Dear Chairman Powell:

The Telecommunications Act of 1996 was signed into law on February 8, 1996, with the mandate that, “within 6 months,” the Commission must “complete all actions necessary to establish regulations to implement” the unbundling requirements of sections 251(c)(3) and (d)(2).<sup>1</sup> Seven years later, the Commission has still failed to do so. Its first set of rules was vacated in its entirety by the Supreme Court because the Commission had failed to apply any “limiting standard” in determining whether particular network elements should be unbundled.<sup>2</sup> Its second, nearly identical set of rules was also vacated – again in its entirety – by the D.C. Circuit because the Commission’s “more unbundling is better” approach failed to take into account the substantial costs of unbundling.<sup>3</sup> The result of these missteps is that, for the last seven years, the industry has labored under a cloud of uncertainty, with ILECs and CLECs alike hampered in their ability to make investment decisions and launch strategic initiatives by the absence of lawful, predictable unbundling rules.

On February 6, NARUC filed a proposal that, if adopted by the Commission, would virtually guarantee yet another legal reversal and prolong the uncertainty that is plaguing the industry and the economy.<sup>4</sup> In brief, under the NARUC proposal, the FCC would reissue the list of UNEs identified in the *UNE Remand Order* – the same list that the D.C. Circuit has struck down as unlawful – and then leave it to state commissions to determine, based on a set of

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<sup>1</sup> 47 U.S.C. § 251(d)(1).

<sup>2</sup> See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999).

<sup>3</sup> *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) (“*USTA*”).

<sup>4</sup> NARUC, *UNE Triennial Review: Principles and Standards for State Commissions*, appended to Ex Parte Letter of James B. Ramsay, NARUC General Counsel (FCC filed Feb. 6, 2003) (“*NARUC Proposal*”).

“generic guidelines” the Commission would articulate, whether any of these elements should be removed from the list. Among other things, each of the 50 states (and the District of Columbia) would be given responsibility for defining the relevant markets, identifying the conditions that determine whether or not impairment exists for each of the identified UNEs, and making the ultimate decision as to whether the network element should be removed.

This letter responds both to the NARUC proposal and to a February 11 letter filed by AT&T in support of that proposal.<sup>5</sup> As shown below, NARUC’s proposal is patently unlawful and AT&T’s attempt to argue otherwise is unavailing. The proposal starts from the unsustainable notion that the Commission can (and should) reissue essentially the exact same list of UNEs that the Supreme Court and the D.C. Circuit have already vacated twice. From this deeply flawed starting point, moreover, the NARUC proposal proceeds to recommend that the Commission delegate its statutory authority to identify those UNEs that must be unbundled, in direct conflict with the plain language of the 1996 Act and basic principles of the supremacy of federal law. And, to make matters worse, NARUC would have the state commissions exercise their newly minted, extra-statutory authority based entirely on so-called “rate zones” that are not detailed in the record, that vary wildly across the states, and that in isolation present a wholly arbitrary basis in and of themselves for unbundling decisions. The NARUC proposal is, in short, hopelessly unlawful and bad public policy. It should be rejected out-of-hand.

**A. The NARUC Proposal Disregards the Language of the 1996 Act and Is Directly Contrary to Binding Precedent.**

Incredibly, the starting point for the NARUC proposal is a national list of UNEs that “include[s] all existing items” – *i.e.*, the exact same list of UNEs that the Commission created in the *UNE Remand Order*, and the D.C. Circuit struck down in *USTA*.<sup>6</sup> NARUC makes this astonishing proposal, moreover, on the understanding that the Commission need not find “impairment” with respect to any of these elements, much less all of them.<sup>7</sup> But the “existing” list of UNEs was wiped from the books by the D.C. Circuit, and the Commission accordingly starts here with a blank slate. And the lesson of the Supreme Court’s vacatur of the Commission’s first effort to establish UNEs – which was made even more explicit by the D.C. Circuit on the second go-round – is that the “necessary” and “impair” standards are not merely precatory. Rather, they require the Commission, in identifying each specific network element, “to apply *some* limiting standard, rationally related to the goals of the Act.”<sup>8</sup> To turn NARUC’s everything/everywhere proposal into law, therefore, the Commission would have to conclude, with respect to virtually every element in the ILEC network in virtually every conceivable locale and for virtually every service, that CLECs and competition would be “impaired” without access

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<sup>5</sup> See Ex Parte Letter from Joan Marsh, AT&T (FCC filed Feb. 11, 2003) (“*AT&T Ex Parte*”).

<sup>6</sup> *NARUC Proposal* Appendix ¶ 2.

<sup>7</sup> The Commission itself has rejected such an approach, acknowledging that it cannot “impose [unbundling] obligations first and conduct [its] ‘impair’ inquiry afterwards.” *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 at ¶ 16 (2000).

<sup>8</sup> *AT&T Corp.*, 525 U.S. at 389.

to ILEC facilities.<sup>9</sup> And the comprehensive record assembled in this proceeding, coupled with the D.C. Circuit's unequivocal rejection of the *UNE Remand Order*'s "more unbundling is better" approach, renders any such conclusion untenable. Indeed, the Commission could not defend its everything/everywhere UNE mandate in the D.C. Circuit on the basis of the record in the *UNE Remand* proceeding. It is inconceivable to think that it would be any more defensible with a record containing three additional years' worth of evidence regarding competitive supply.

Recognizing that NARUC's proposal to unbundle absent impairment is flatly unlawful, AT&T recharacterizes NARUC's proposal as recommending "that the Commission find impairment as to each existing UNE."<sup>10</sup> But NARUC did not suggest that the Commission should or even could find impairment as to each existing UNE. Indeed, NARUC did not even propose that the Commission presume impairment for switching, except in zone three. In zone one it recommended that the Commission *presume* a lack of impairment for large high-volume customers, and, for other customers in zone one and for all customers in zone two, it urged the Commission to find the record "inconclusive."<sup>11</sup>

In any event, AT&T's proposed fix is just a different road to reversal. Mischaracterizing *USTA*'s broad indictment of the Commission's prior "more unbundling is better" analysis as a "narrow" decision that did nothing more than call into question the state of the record in the *UNE Remand* proceeding, AT&T asserts that, last time, it just didn't try hard enough, and, this time, it has provided the Commission with a record to support unbundling everything everywhere.<sup>12</sup> That is absurd. Take, for example, the recommendation that the Commission unbundle transport everywhere, just as it did in the *UNE Remand Order*.<sup>13</sup> In *USTA*, the D.C. Circuit pointed specifically to the *UNE Remand Order*'s finding that "47 of the top 50 areas have 3 or more competitors providing interoffice transport," and it admonished the Commission for failing to "explain[] why the record supports a finding of material impairment where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis."<sup>14</sup> The undisputed record before the Commission demonstrates that, now, 49 of the top 50 areas have *five* or more competitors.<sup>15</sup> With this and other evidence of competitive supply, the Commission simply cannot, once again, conclude that CLECs are impaired *everywhere* without access to ILEC transport.

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<sup>9</sup> The Commission could not avoid this necessity by presuming, without conclusively finding, that impairment existed. Such an approach would not obviate the critical fact that at the point in time at which its rules became effective, the Commission would be forcing ILECs to unbundle the elements in question without a finding of impairment.

<sup>10</sup> *AT&T Ex Parte* at 1.

<sup>11</sup> *NARUC Proposal* ¶ II.A.

<sup>12</sup> See *AT&T Ex Parte* at 4 ("The record here fills any conceivable gaps in the record presented in the *UNE Remand Order*").

<sup>13</sup> See *NARUC Proposal* ¶ II.B.

<sup>14</sup> *USTA*, 290 F.3d at 422.

<sup>15</sup> See *UNE Fact Report 2002* at App. K, attached to Comments of SBC Communications Inc. (FCC filed Apr. 5, 2002) ("*UNE Fact Report 2002*").

The record with respect to switching is equally insufficient to support a finding of impairment. CLEC switches already serve customers in wire centers that account for approximately 86 percent of the Bell companies' access lines, and CLECs are actually using these switches to serve mass-market customers.<sup>16</sup> As of year-end 2001, CLECs were serving approximately 3 million residential lines over their own switches, and were offering mass-market service to at least five times that number.<sup>17</sup> Since the *UNE Remand Order*, the number of lines served by competitive circuit switches increased 283 percent, and, between 2000 and 2001 alone, the number of telephone numbers ported by CLECs to their own switches increased 73 percent.<sup>18</sup> Indeed, CLECs have admitted that they can profitably serve mass-market customers with their own switches.<sup>19</sup> Some CLECs nevertheless claim impairment from the hot cuts required to use unbundled loops with competitive switches. The unrefuted evidence in the record, however, demonstrates that ILECs are capable of provisioning hot cuts in significant volumes (and the Commission has repeatedly held as much in the section 271 context).<sup>20</sup> This evidence – along with much, much more in the record – demonstrates that, as to significant aspects of the local market, CLECs can and do compete everyday without access to ILEC facilities. The NARUC proposal, which completely disregards that basic, all-important fact, is thus wholly inconsistent with the record and flies in the face of the D.C. Circuit's judgment.

NARUC's proposal cannot be defended as a mere "transition" from the prior, unlawful regime.<sup>21</sup> As an initial matter, calling a proposal a "transition" does not insulate it from judicial review, especially when the supposed transition is of unlimited duration and is supposed to begin seven years after the Commission was supposed to – but did not – establish lawful rules that meaningfully limit unbundling.<sup>22</sup> In any event, the very use of the term "transition" denotes the eventual arrival of some new and changed regime. But NARUC's use of that term here fools no one. As NARUC admits, the very point of this proposal is to keep in place the *existing UNE Remand* rules but, by cloaking them with the veneer of state-commission authority, to avoid strike three in the D.C. Circuit.<sup>23</sup> There will be no "transition" (at least not until the federal courts get involved) – certainly not in the states that are already on record as committed to

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<sup>16</sup> See *id.* at II-1 & App. C.

<sup>17</sup> See *id.* at II-1 & App. C; *UNE Rebuttal Report 2002* at 37, attached to Ex Parte Letter from Dee May, Verizon (FCC filed Oct. 23, 2002) ("*UNE Rebuttal Report 2002*"). Subscribers, at [http://www.ncta.com/industry\\_overview/indStats.cfm?statID=13](http://www.ncta.com/industry_overview/indStats.cfm?statID=13).

<sup>18</sup> See *UNE Fact Report 2002* at I-5, Table 3; *id.* at II-5, Table 3.

<sup>19</sup> See, e.g., Cavalier Telephone Press Release, *Cavalier Telephone Revenues Soar; Operational Earnings Turn Positive* (July 11, 2002) (Cavalier vice president of finance David White: "Our investment in . . . switching networks gives us advantages in the marketplace. More importantly, we are beginning to reach economies of scale, which combined with our low cost structure, improve profitability.").

<sup>20</sup> See, e.g., *UNE Fact Report 2002* at II-16 - II-17; *id.* at App. H.

<sup>21</sup> See *NARUC Proposal* ¶ I, III; see also *AT&T Ex Parte* at 3.

<sup>22</sup> Cf., e.g., *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002) (permitting Commission to depart from the statute where deviation is "clearly temporary").

<sup>23</sup> See *NARUC Proposal* ¶ III.

imposing maximum unbundling regardless of what the evidence shows or what is in the long-term best interests of consumers and competition.<sup>24</sup> The D.C. Circuit stayed the mandate of its *USTA* decision only when the Commission committed to issuing new unbundling rules by a specific date.<sup>25</sup> It is impossible to imagine that court yielding to an additional, open-ended extension of those unlawful rules. The courts will not look kindly on such a continuing shell-game to avoid the prompt establishment of lawful rules that meaningfully limit unbundling in a manner consistent with the 1996 Act and binding judicial guidance.

## **B. The FCC Cannot Lawfully Delegate Unbundling Decisions to the States.**

The NARUC proposal assumes – without any citation or elaboration of any kind – that the FCC can delegate to the states the question of whether particular network elements should be unbundled in particular circumstances. But, as a number of state commissions themselves appear to recognize,<sup>26</sup> the language of the 1996 Act permits no such reading. Section 251(d) specifically charges “*the Commission*” with “complet[ing] all actions necessary to establish regulations to implement the requirements of [section 251],” and it further provides that, “[i]n determining what network elements should be made available for purposes of [section 251(c)(3)], *the Commission* shall consider, at a minimum,” the “necessary” and “impair” standards.<sup>27</sup> It is well established that a federal agency may delegate its authority to the states only if Congress intended to permit that result.<sup>28</sup> Section 251(d)’s unequivocal references to “*the Commission*” plainly establish that Congress intended quite the contrary.

The Act’s requirement that the Commission – and not the states – make unbundling decisions is confirmed elsewhere in the statute. For example, section 252(c) calls upon states to “establish any rates” for interconnection and UNEs according to the standards set out in section

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<sup>24</sup> AT&T asserts that “there is no likelihood that States would fail to participate in this process.” *AT&T Ex Parte* at 2. It bases this assertion, however, solely on the fact that *some* states, and NARUC itself, have participated in *Triennial Review*. Of course, not all states have participated, and there is in any event no reason to believe that participation here necessarily means states have the time and resources to devote to the comprehensive, fact-intensive proceedings called for by the NARUC proposal.

<sup>25</sup> See Order, *United States Telecom Ass’n v. FCC*, Nos. 00-1015 & 00-1025 (D.C. Cir. Dec. 23, 2002); see also Emergency Consent Motion of the Federal Communications Commission To Extend Partial Stays of Mandates, *United States Telecom Ass’n v. FCC*, Nos. 00-1012, *et al.* & 00-1015, at 6 (D.C. Cir. filed Dec. 4, 2002) (requesting “a month-and-a-half extension of [the D.C. Circuit’s stays of the mandate in *USTA*] . . . to enable the Commission to complete its action on remand before vacatur of the *Line Sharing Order* and (apparently) the *Local Competition Order* takes effect”).

<sup>26</sup> See Ex Parte Letter from the Hon. Thomas L. Welch, Chairman, Maine Public Utilities Commission, the Hon. Alan R. Schriber, Chairman, Ohio Public Utilities Commission, the Hon. Charles M. Davidson, Florida Public Service Commission, and the Hon. Greg Sopkin, Colorado Public Utilities Commission (FCC filed Feb. 6, 2003) (“we have no quarrel with you and indeed agree that the FCC must, in the first instance, determine whether competing carriers are ‘impaired’ in the provision of a telecommunications service”).

<sup>27</sup> 47 U.S.C. § 251(d) (emphasis added).

<sup>28</sup> See, e.g., *National Park & Conservation Ass’n v. Stanton*, 54 F. Supp. 2d 7, 18 (D.D.C. 1999); see also *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 795 (9th Cir. 1986).

252(d).<sup>29</sup> It is accordingly clear that, where Congress intended to delegate particular decisions in sections 251 and 252 to the states, it did so directly and unambiguously. Its failure to do so with respect to unbundling decisions is itself dispositive of the lawfulness of the NARUC proposal. NARUC nevertheless points to section 271, and it asserts that the unbundling decisions the states would make under its proposal would be “similar to the detailed fact-finding and other work of the state commissions in evaluating BOC applications” for long-distance relief.<sup>30</sup> Even in section 271, however, the statute directs “*the Commission*” to “determin[e]” whether a Bell company applicant has satisfied section 271 and is therefore entitled to interLATA relief.<sup>31</sup> As the Commission has held in unmistakable terms, the statute thus vests *the Commission* with exclusive jurisdiction over Bell company interLATA entry.<sup>32</sup> While the FCC must consult the states and consider their recommendation, the FCC cannot delegate its authority to approve section 271 applications to the states. The same goes for identifying network elements, which likewise are to be “determin[ed]” by *the Commission*.<sup>33</sup> Indeed, in this context, Congress has not even granted states the consultative role that, by statute, they have under section 271. Accordingly, there is even less reason to conclude that the FCC can abdicate its statutory responsibilities here.

The delegation sought by NARUC is especially problematic, moreover, because there is no indication that the states would follow the principles of section 251(d)(2) themselves. In fact, there is evidence to the contrary.<sup>34</sup> In short, the 1996 Act reflects Congress’s considered

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<sup>29</sup> 47 U.S.C. § 252(c)(2).

<sup>30</sup> *NARUC Proposal* ¶ III n.1.

<sup>31</sup> 47 U.S.C. § 271(d)(3) (emphasis added).

<sup>32</sup> See First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, ¶¶ 34, 47 (1996), *modified on recon.*, 12 FCC Rcd 2297, *further recon.*, 12 FCC Rcd 8653 (1997); see also Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., for Authorization To Provide In-Region, InterLATA Services in California*, WC Docket No. 02-306, FCC 02-330, ¶ 168 (rel. Dec. 19, 2002) (“Congress granted the Commission exclusive authority to determine whether a BOC may provide interLATA services”).

<sup>33</sup> See 47 U.S.C. § 251(d). The absurdity of the contrary reading is highlighted by the California Public Utilities Commission’s recent decision determining that incumbent LECs must unbundle the high frequency portion of the loop. See Interim Opinion Establishing a Permanent Rate for the High-Frequency Portion of the Loop, Decision 03-01-077 (Cal. PUC Jan. 30, 2003). In reaching this decision, the state commission held that, because it is not the FCC, it is entitled to impose unbundling requirements without regard to the “necessary” and “impair” standards of section 251. See *id.* at 12-15. The position of AT&T and others who support the NARUC proposal is thus not only that the states have authority over unbundling, but that they can exercise this authority without regard to whether the standards this Commission is charged with implementing are satisfied.

<sup>34</sup> See, e.g., note 33 *supra*. See also letter from Rebecca Klein, chairman, PUCT, to Michael K. Powell, Chairman, FCC, at 2 (Feb. 6, 2003). This letter, in arguing that “UNE-P is the only viable market entry mechanism that readily scales to varying sized exchanges to serve the mass market, while minimizing capital outlays and permitting a CLEC to gain a foothold,” appears to ignore, among other things, the D.C. Circuit’s express admonition that cost disparities “faced by virtually any new entrant in any sector of the economy” alone do not provide a sufficient basis to require unbundling. *USTA*, 290 F.3d at 426.

judgment that the Commission is best situated to make the difficult trade-offs inherent in fashioning an unbundling mandate that is true to the objectives of the 1996 Act and reflects a proper understanding of the costs of too much unbundling. NARUC's proposal rests on precisely the opposite premise – that the states can and should determine what elements should be unbundled. Because federal law forecloses that approach, the proposal should be rejected.

**C. Sections 251 and 261 Do Not Permit the Commission to Abdicate Its Obligation to Determine UNEs.**

Although NARUC offers little in the way of statutory authority for its unprecedented proposal that the Commission delegate its unbundling authority to the states, AT&T attempts to fill the gap with citations to sections 251(d)(3) and 261(b).<sup>35</sup> Both provisions permit the states to act only in a manner that is “consistent with” the Act and the Commission’s rules and does not “substantially prevent implementation” of the Act and its purposes.<sup>36</sup> State-commission decisions countermanding FCC unbundling determinations would do both. And section 252(c)(1), upon which AT&T also relies, expressly requires state commissions to resolve arbitration proceedings in a manner consistent with “the regulations prescribed by the Commission pursuant to section 251.”<sup>37</sup> Those regulations, of course, “shall” include “all actions necessary . . . to implement” the requirements of section 251(c)(3).<sup>38</sup>

Indeed, this is water under the bridge for the Commission. As the Commission has told the Supreme Court, section 251(d)(3) is merely an “anti-field preemption provision” that leaves intact ordinary principles of conflict preemption.<sup>39</sup> To the extent that AT&T contends that either section 251(d)(3) or section 261(b) strips the Commission’s implementing regulations of preemptive force while preserving the preemptive force of the Act itself, the Commission has already rejected that claim as well, and for good reason. It has explained that, because “the 1996 Act elsewhere indicates that the scope of its ‘requirements . . . includ[es] the regulations prescribed by the Commission[,]’ . . . there is no merit to the . . . argument” that either section 251(d)(3) or section 261(b) “limits the legal effect of validly issued Commission rules.”<sup>40</sup> AT&T’s contrary position would comprehensively and dramatically curtail the Commission’s general jurisdiction under the 1996 Act -- jurisdiction that AT&T, before its recent conversion, successfully persuaded the Supreme Court to affirm.

Indeed, far from permitting the states to supplant the Commission’s role in determining what UNEs must be made available, federal law in fact requires that the states adhere to the decisions the Commission makes in fulfilling this role, including its decisions *not* to require unbundling of particular elements. Where the Commission elects not to unbundle a particular

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<sup>35</sup> *AT&T Ex Parte* at 6.

<sup>36</sup> *See* 47 U.S.C. §§ 251(d)(3), 261(b).

<sup>37</sup> 47 U.S.C. § 252(c)(1).

<sup>38</sup> *Id.* § 251(d).

<sup>39</sup> FCC Reply Br. 19 n. 13, *AT&T v. Iowa Utils. Bd.*, Nos. 97-826 et al. (filed June 1998).

<sup>40</sup> FCC Supreme Court Reply Br. 18, n. 13 (*quoting* 47 U.S.C. § 252(c)(1)).

element – as, for example, it did in the *UNE Remand Order* in most circumstances with regard to packet switching – it makes a determination that unbundling is inconsistent with the language and objectives of the Act.<sup>41</sup> It is black-letter law that, in these circumstances, the Commission's decisions *not* to regulate have as much force as if it had decided *to* regulate.<sup>42</sup> That is especially so now that the D.C. Circuit has unequivocally instructed the Commission to articulate an unbundling mandate that “confront[s]” the costs of unbundling, including “the disincentive to invest” by CLECs and ILECs alike, as well as the costs of “managing shared facilities.”<sup>43</sup> The decisions that result from this mandate will accordingly reflect a balance between, on the one hand, the benefits to competition that come with a targeted and rational approach to unbundling, and, on the other, the undeniable social costs of unbundling. In these circumstances, any state decision to countermand a Commission decision not to unbundle a particular element will necessarily upset that balance and is accordingly unlawful.

In fact, the Commission has for all practical purposes already recognized as much. In the *UNE Remand Order*, the Commission noted that, wherever it “found that unbundling particular network elements [wa]s necessary to further the goals of the Act . . . state decisions to remove these network elements from the national unbundling obligations would ‘substantially prevent implementation’” of the Act.<sup>44</sup> Particularly now that the D.C. Circuit has explained that the Commission's unbundling decisions must take into account the costs of unbundling – *i.e.*, that unbundling can be, and often is, a bad thing – the converse must also be true. As AT&T explained in its *UNE Remand* comments – before it opportunistically made yet another about-face before the Commission – “[a]ny process that involves individualized decisions by state commissions would inevitably give free play to [state policy] differences, and would create a patchwork of decisions on the availability of network elements that would reflect *not* the application of the congressional standards to different sets of facts, but the application of radically different standards *that would subvert the national policy established by Congress*.”<sup>45</sup>

#### **D. NARUC's Exclusive Reliance on “Zones” is Arbitrary and Unreasonable.**

Apart from inviting the Commission to abdicate its statutory duty by delegating unbundling decisions to the states, the NARUC proposal would have the states exercise their

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<sup>41</sup> See *UNE Remand Order*, 15 FCC Rcd 3696, 3835-40, ¶¶ 306-317 (2002).

<sup>42</sup> See, e.g., *Fidelity Fed'l Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 155 (1982) (a federal regulation that “consciously has chosen not to mandate” particular action preempts state law that would deprive an industry “of the ‘flexibility’ given it by [federal law]”); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (“statutorily authorized regulations . . . will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof”); see also *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (federal preemption precludes state-level regulation that would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”) (internal quotation marks omitted).

<sup>43</sup> *USTA*, 290 F.3d at 425, 427.

<sup>44</sup> *UNE Remand Order*, 15 FCC Rcd at 3768, ¶ 157.

<sup>45</sup> AT&T *UNE Remand* Reply Comments, CC Dkt. No. 96-98, at 57-58 (filed June 10, 1999) (emphasis added).

newfound and extra-statutory authority on the basis of wholly arbitrary factors. By its terms, the proposal would create a “presumption” regarding whether a particular circuit switch must be unbundled based exclusively on whether the facility is in “zone 1,” “zone 2,” or “zone 3 and higher.”<sup>46</sup> Although NARUC does not explain the logic behind this approach, the theory appears to be that separate zones – which some states have established as a result of the Commission’s rule requiring deaveraging of UNE rates<sup>47</sup> – correlate in some particular way with population density, such that the economics of competitive switch deployment will vary across these zones in some predicable way.

As an initial matter, however, there is no evidence in the massive record assembled in this proceeding – *none* – that links CLEC impairment in deploying switches to the various zones across the states. It is axiomatic that, to survive review in the courts, Commission decisions must be supported by “substantial evidence.”<sup>48</sup> In light of the failure of any party to develop any evidence on the relationship between CLEC impairment and rate zones, a Commission unbundling decision that assumes such a relationship exists would fail that threshold test.

Indeed, apart from their failure to provide any evidence linking CLEC impairment to zones, NARUC and its supporters do not – because they cannot – even offer evidence that reliably documents the characteristics (*e.g.*, population density, customer mix, etc.) of each zone across the states. That is because the zones do not, in fact, share these characteristics across the states. The Commission has given the states wide latitude in establishing deaveraged rates, consistent with the pricing authority granted to states under the Act, and, as SBC has previously explained in detail,<sup>49</sup> the states have responded with a broad array of methodologies. To pick just a few examples, some states in SBC’s region developed zones based on the number of access lines per square mile; another used average loop length; and still another relied on access lines per wire center. Qwest’s region exhibits similar variation. In fact, Montana and Wyoming define UNE zones based on the distance of the customer from the wire center, so that a single wire center may fall into multiple UNE zones. Unsurprisingly, these vastly different methodologies spawned vastly different results. In Illinois and Michigan, roughly half of all SBC’s loops are in the highest priced UNE loop rate zones. In Texas, approximately a fifth of all SBC loops are in the highest priced zone. NARUC’s proposal – which would hinge switching decisions solely on zone status without consideration of any other relevant factors – would be arbitrary and capricious given the undeniable fact that zones 1, 2 and 3 mean different things in different states.

NARUC also offers no solution to the question of how its unbundling rules would apply where a state has not, in fact, completed the task of creating zones. There is no evidence in the record to suggest that all states have completed this chore, and, in fact, it is SBC’s understanding that many states have yet to establish zones at all for the independent ILECs doing business in their states that have not yet arbitrated UNE rates. The NARUC proposal provides no guidance

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<sup>46</sup> *NARUC Proposal* ¶ II.

<sup>47</sup> *See* 47 C.F.R. § 51.507(f).

<sup>48</sup> *See, e.g., Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050-51 (D.C. Cir. 2002).

<sup>49</sup> *See* Ex Parte Letter of Jim Lamoureaux, SBC (FCC filed Feb. 6, 2003).

on how its zone-based “presumptions” would be applied where there are no zones in place today for an ILEC. The proposal is accordingly not only arbitrary, but also incomplete.

**E. The NARUC Proposal Misunderstands the Point of a “Granular” Analysis.**

To the extent it bothers to feign consistency with the statute and binding judicial precedent, the NARUC proposal attempts to draw support from the D.C. Circuit’s call for greater “granularity” in the Commission’s unbundling analysis.<sup>50</sup> The theory here is that, “because of the great degree of variation in markets and submarkets between states and across elements,” states are best equipped to determine whether CLECs are impaired without access to elements in particular circumstances, and accordingly to determine whether and where a particular element should be unbundled.<sup>51</sup> But NARUC does not even attempt to support this assertion with anything approaching rigor. Nowhere in its three-page filing does it address the tens of thousands of pages of record evidence, analysis, and data that have been submitted to the Commission in this proceeding, much less explain why, with this mountain of evidence, the Commission is incapable of making granular unbundling determinations. Nor does NARUC identify exactly what additional, crucial information not available to the FCC would, in fact, be gleaned if everyone started over in fifty separate state proceedings.

NARUC’s reasoning is badly flawed in any event. The granular analysis mandated by the D.C. Circuit is directed not at particular geographic locations, but rather at the characteristics of the market in question and the services the CLEC seeks to provide. It therefore requires the Commission to tailor its unbundling analysis to the *type* of location – say, for example, a wire center with a particular number of access lines – and the service the CLEC wishes to provide there – say, for example, basic local telephone service. Contrary to NARUC’s apparent understanding, the *USTA* decision does *not* require – indeed, it does not permit – different unbundling regimes to apply to markets with the same characteristics, based on nothing more than the fact that the two are in separate states. As the Commission has already explained – and as the Supreme Court has echoed – the obligation to provide network elements on an unbundled basis is a *national* mandate that calls for *national* rules.<sup>52</sup> Far from justifying a delegation of unbundling decisions to the states, the *USTA* decision simply makes clear that, when establishing those national rules, the Commission must take into account the many instances in which CLECs have proven their ability to compete without access to ILEC facilities, and to extrapolate from those instances generally applicable rules regarding the circumstances in which CLECs are truly impaired without access to UNEs. The NARUC proposal, which presents instead the prospect that ILECs could be subject to radically different unbundling regimes in markets with identical characteristics, is far afield from this common-sense approach.

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<sup>50</sup> See *NARUC Proposal*, Caveat ¶ 1; see also *AT&T Ex Parte* at 2.

<sup>51</sup> *NARUC Proposal* ¶ III.A. & n.2.

<sup>52</sup> See *UNE Remand Order*, 15 FCC Rcd at 3768-70, ¶¶ 158-161 (State-by-state variation in unbundling rules would “lead to greater uncertainty in the market”; “frustrate the ability of carriers to plan” their business strategies; discourage carriers from “rais[ing] capital” to “enhance their networks”; “complicate negotiation of interconnection agreements”; and lead to state-by-state “litigation in the federal courts.”); *AT&T Corp.*, 525 U.S. at 379 & n.6.

## Conclusion

In 1996, and again in 1999, the Commission created an unlawfully permissive unbundling regime that encouraged CLECs to forgo investment in their own facilities while permitting state commissions, by setting rock-bottom UNE rates, to facilitate mass-market entry (or, more precisely, cherry-picking of the highest-revenue customers) through the guise of what the D.C. Circuit has aptly characterized as “synthetic” competition. That unlawful regime has been in place for nearly seven years, and it should come as no surprise that the prospect of its correction has triggered a fierce lobbying campaign. But the political pressure that has been brought to bear on the Commission cannot obscure the right course in this proceeding. The Commission is duty-bound to apply the law as written by Congress and interpreted by the courts. And that law requires the Commission – not the states – to make the difficult decisions now regarding what elements should and should not be unbundled in what markets, and to make those decisions with due account for the social costs that unbundling imposes on society. Making those decisions will require political will, but it is right for the industry as a whole, it is in the best long-term interests of consumers and competition, and it is required by the law. I am confident the Commission will ultimately agree.

Yours truly,

/s/ Gary L. Phillips

/s/ R. Steven Davis

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